In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENTS BELOW

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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INTRODUCTION

The International Longshoremen's and Warehousemen's Union (*amicus*) is the certified collective bargaining representative of "workers who do longshore work in the

Pacific Coast ports of the United States" for West Coast shipping, stevedore and terminal companies and their agents. *Shipowners Association of Pacific Coast, et al.*, 7 NLRB 1002, 1041 (1938). The employees it represents are engaged in "the old-fashioned process" (*Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272 [1977]) of handling break bulk cargo on the Pacific Coast waterfronts as well as in the stripping and stuffing of containers and in the clerical functions related to both operations.

The Union's concern here, on behalf of these employees, is that the Court shall not enunciate a rule which will deprive them of the coverage which, by the 1972 amendments to the Longshoremen and Harborworkers' Act, 33 U.S.C. 901 et seq. (the Act), Congress intended they should have, and that no line shall be drawn which will exclude any such workers from that coverage. To that end, this brief will review the background of the present case and the proposals of the Director of the Office of Workers' Compensation Program and of Petitioners, and will suggest a test for determining maritime employment which *amicus* believes comports with the Congressional objectives in adopting the 1972 amendments.

Since the decision in *Northeast Marine, supra*, makes it perfectly clear that employees engaged in the stripping and stuffing of containers and the clerical work related thereto are covered and since the petition in this case raises the question of coverage only in so far as it affects employees engaged in non-containerized operations (Brief for Petitioners, 3-4), *amicus* will examine tests proposed to determine when employees engaged in such break bulk operations are covered by the amendments and will propose what *amicus* believes is a test which should be adopted by the Court.

THE FACTS

By the 1972 amendments to the Act, Congress extended coverage to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ." 33 U.S.C. 902(3).

The questions presented by this case are whether two workers who were injured in separate accidents, under the circumstances described below, were engaged in such employment.[1]

1. Respondent Ford was injured while "helping to secure a military vehicle to a railway flatcar in preparation for its transportation inland. The vehicle . . . had arrived . . . [several] . . . days prior to the accident. Since then it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flatcars." *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 543 (5th Cir. 1976) (Pet. App. 46).[2] The court of appeals held that the work Ford was performing at the time of his injury was "the last step in transferring this cargo from sea to land trans-

[1] There is no question here that the "situs" of each accident meets the tests laid down by the Court in *Northeast Marine, supra*, at 264-265, 279-281. (Brief for Petitioners, 7 n. 11)

[2] This is the original decision of the court of appeals in this case which was remanded, 433 U.S. 904 (1977), for further consideration in light of *Northeast Marine* (Pet. App. 29). It is reproduced at Pet. App. 30-55. Since the decision of the court of appeals on remand, 575 F.2d 79 (5th Cir. 1978), which is the subject of the instant proceeding (Pet. App. 27-28), did not restate the facts, we take them from the original decision.

portation" (*ibid.*) and was "an integral part of the process of moving maritime cargo from ship to land transportation" (*ibid.* at 47). It therefore affirmed the decision of the Benefits Review Board that Ford was entitled to benefits under the Act, rejecting the contention that coverage should be denied "because of a discontinuity in time created by the cargo's having been stored for a while along the shore." (*ibid.*).

2. Respondent Bryant was injured while working "in a warehouse immediately adjacent to a pier . . . [where] loads of cotton are first deposited at various shoreside warehouses by inland shippers. The cotton is then placed on dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other 'cotton headers' [3] is to unload the bales of cotton and stack them in pier warehouses . . . Generally, the cotton remains in the warehouses until other employees . . . take it on board ship." (*ibid.* at 48). The court of appeals affirmed the award of benefits to Bryant, holding that since he would have been directly involved in "longshoring operations" if, "instead of setting the cargo down, he had handed it to 'longshoremen' for immediate loading on board a ship", the "discontinuity in time created by the cotton's temporary storage did not alter the essential nature of [his] work, which was an integral part of moving cargo between land transportation and a ship." (*ibid.* at 49-50).

[3]The fact that respondent Bryant was a member of a "cotton headers'" local while other employees were members of a "longshoremen's" local is of no significance. *Northeast Marine, supra,* at 268, and n. 30; *Cargill, Inc. v. Powell,* 573 F.2d 561, 563, n. 2 (9th Cir. 1978) (Pet. App. 60, n. 2), cert. pending, No. 77-1543.

NORTHEAST MARINE TERMINALS

1. The point of departure here is, of course, the Court's decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977). There the Court held that a worker injured under the following circumstances was covered by the amendments:

> "On April 16, 1973, Caputo was hired by Northeast to work as a 'terminal labor[er]'. . . . A terminal laborer may be assigned to load and unload containers, lighters, barges, and trucks. . . . When he arrived at the terminal, Caputo was assigned, along with a checker and forklift driver, to help consignees' truckmen load their trucks with cargo that had been discharged from ships at Northeast's terminal. Caputo was injured while rolling a dolly loaded with cheese into a consignee's truck." 432 U.S. at 255 (footnotes omitted)[4].

The instant case presents once again the question of coverage for employees engaged, as was Caputo, in "the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" (432 U.S. at 272) or a railroad car, or vice versa.

It is the submission of *amicus* that, for the purposes of this case, there is no meaningful or significant distinction between the work performed by respondents and that per-

[4]Another worker, Blundo, who was injured while checking cargo being stripped from a container which had been previously unloaded from a vessel and then transported overland to the place of injury (432 U.S. at 253), was also held to be covered.

The instant case does not present any question of coverage for an employee engaged in stuffing or stripping containers or in clerical work which is part of the loading or unloading process. Employees so engaged are, according to the teaching of *Northeast Marine,* clearly covered by the 1972 amendments.

formed by Caputo. In each instance, the injured employee was engaged in maritime employment.[5]

2. It is true, as the Court observed in *Northeast Marine, supra, at* 265, that the failure of Congress to define the relevant terms has made more difficult the task of applying them to these situations. However, "we are not without guidance in resolving that question" (*ibid.* at 268).

A. In determining that Blundo, who was injured while checking cargo being stripped from a container which had been trucked overland by an independent trucking company to the place of the accident, and Caputo, who was injured while helping a consignee's truckman load his truck, were both covered by the Act, the Court found such "guidance" in, *inter alia,* the fact that "[t]he language of the 1972 Amendments is broad and suggests that we take an expansive view of the extended coverage"—a construction which, it remarked, is "appropriate for this remedial legislation"

[5]While it is true that the Court resolved the question for Blundo on the ground that in checking cargo being stripped from a container he was doing precisely the kind of work Congress had in mind in enacting the Amendments (432 U.S. at 269-271), nonetheless, his case, as well as Caputo's, is relevant in helping determine what it is that constitutes maritime employment. The Court held that the fact that the cargo had been trucked overland to the place where Blundo was injured did not destroy the maritime nature of his employment.

> "We find no significance in the fact that the container Blundo was stripping had been taken off a vessel at another pier and then moved to the site of the injury. Until the container was stripped, the unloading process was clearly incomplete." *ibid.* at 271, n. 33

The Court also noted that

> ". . . the consignee's delay in picking up the cargo has no effect on the character of the work required to effectuate the transfer of the cargo to the consignee. The work performed by the longshoreman is the same whether performed the day the cargo arrives in port or weeks later." *ibid.* at 274, n. 37

(*ibid.*). There is no reason why this basic approach to the amendments should not be applied in the instant case.

B. Involved in the legislative decision to extend coverage shoreward was the fact that containerization has moved loading and unloading operation shoreward (*ibid.* at 269-271). That, however, was not the only motivation for the legislation. Another significant factor was the desire to have "a uniform compensation system" applicable to *all* employees who would be covered by the Act for *any* part of their activities (*ibid.* 272).

WHAT IS MARITIME EMPLOYMENT

There are several possible ways of interpreting the 1972 amendments to achieve the Congressional objective for uniformity.

1. One is to examine, as the Court did in *Northeast Marine,* whether or not, on the basis of the totality of his work experience, the injured worker is a "longshoreman" (*ibid.* 273). That approach solved the problem in Caputo's case (thereby rendering it unnecessary for the Court to consider any other questions [*ibid.* at 272]), because "[i]t is clear, *at a minimum,* that when someone like Caputo performs such a task, he is to be covered" (432 U.S. at 273; italics supplied). The Court, however, was clearly not delineating the outer limits of coverage for employees engaged in the "old-fashioned" cargo handling processes; nor was it determining the outer limits of the phrase "maritime employment" as used in the amendments.[6]

[6]

> ". . . the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations" *Northeast Marine, supra,* 432 U.S. at 265, n. 25.

What was said in relation to Caputo should not, we submit, be converted into a rule which would exclude from "maritime employment" all employees to whom the label "longshoremen" may not be readily applied (see n. 3, *supra*). Like the repudiated "point of rest" theory (432 U.S. at 274-279), such an approach would create a multitude of problems and lead to a proliferation of decisions on all levels which could only result in confusion, in the creation of hairline distinctions and in the inclusion or exclusion of workers based upon a series of conflicting judgments about who is or who is not a "longshoreman". It is doubtful that this approach would result in the uniform compensation system desired by Congress.

2. Another approach, one which has the virtue of simplicity in application and uniformity in result, is that proposed by the Director, Office of Workers' Compensation Programs: the amendments reach "all physical cargo handling activity" anywhere in the situs area, so that "maritime employment" includes "all physical tasks performed on the waterfront . . . necessary to transfer cargo between land and water transportation" (*ibid.* at 272).

While the Court in *Northeast Marine* found it unnecessary to decide whether the Congressional desire for uniformity required the adoption of this view, it is submitted that the Director's approach has much to commend it.

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[7] *Amicus* suggests that the Director can not have meant to limit coverage to "physical" cargo handling activity alone. The legislative history of the amendments and the Court's decision in Blundo's case make it clear that clerical work like the checking and marking of cargo which is an "integral part" of the loading and unloading process (432 U.S. at 271) is to be covered.

It is not clear, however, whether the Director would apply this proposed test only to the work an employee was doing at the moment of injury or would include in it any work to which the employee could be assigned during the course of his employment. If the former is the case, *amicus* must object to it because it will reintroduce the walking in and out of coverage problem.[8] If the Director proposes that his criteria be applied to any work to which the employee could be assigned during the course of his employment, *amicus* has no quarrel with him save as noted in n. 7, *supra*.

This test, with the qualification noted, is simple and precise in application. It would obviate, or at least minimize, the necessity for a case by case approach with the inevitable concomitant of conflicting, or finely distinguished, decisions based on varied appraisals of a worker's status as a "longshoreman". It would lay down clear and administratively workable guidelines.

3. Petitioners propose a much more restrictive test:

> "On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States." (Brief for Petitioners, 30-31).

First, *amicus* agrees that an employee's coverage ought to depend on whether he is "subject to being assigned by his employer to perform any part of his work" on the situs, rather than limiting inquiry to what he was doing at the

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[8] In urging the "point of rest theory", the *Northeast Marine* petitioners

> "fail[ed] to give effect to the obvious [Congressional] desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation' " 432 U.S. at 276.

precise moment of injury—a limitation which would bring back the anomalous situation in which a worker might be walking in and out of coverage all day long. However, the principal trouble with petitioners' proposed test is that it limits the situs to the "navigable waters of the United States"—a concept which, it is clear, the 1972 amendments specifically rejected by adding to the Act the words "including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other area customarily used by an employer in loading, unloading, repairing, or building a vessel. . . ."[9]

Petitioners' test simply ignores the legislative intent to extend the scope of the Act's coverage from navigable waters to adjoining areas as specified in the amendments and would reintroduce the "Jensen line" (*Southern Pacific Co. v. Jensen*, 244 U.S. 205 [1917], which was moved landward by the 1972 amendments. *Northeast Marine, supra*, 432 U.S. at 257-260.

THE PROPOSAL OF AMICUS

It seems to *amicus* that an appropriate test, and one which meets the Congressional desire for uniformity, would be this:

> Was the employee subject to being assigned by his employer to perform any part of his work upon the navigable waters of the United States, including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.

[9] *Amicus* suggests also that the test not be limited, as petitioners propose, to "the date of his injury". Many workers are hired for longer periods of time—the duration of a job or a fixed weekly period, for example. There is no reason, therefore, why their coverages should be as temporally circumscribed as petitioners suggest.

This provides the uniformity necessary to avoid the walking in and out of coverage problem and it gives effect to Congress' intent that navigable waters include piers, wharves, terminals, and other adjoining areas customarily used (for longshore purposes) in loading and unloading vessels. Such a test is easy of application and should result in uniformity of decision. It is consistent with what the Court said of Caputo: "He could have been assigned any one of a number of tasks necessary to transfer cargo between land and maritime transportation" (432 U.S. at 273) and that to exclude him from coverage "would be to revitalize the shifting and fortuitous coverage the Congress intended to eliminate" (*ibid.* at 274).

CONCLUSION

Because respondents met the test proposed by *amicus,* indeed they were actually performing such work when injured, the judgments below should be affirmed.[10]

San Francisco, California,
February 1979.

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[10]The result here will not be inconsistent with Judge Gibbon's analysis in *Sea-Land Services v. Director, Office of Workers' Compensation Programs,* 540 F.2d 629 (3rd Cir. 1976), which fixes the point of demarcation at "the interface between the . . . land and the water modes of transportation" (540 F.2d at 638) or ". . . the point when the cargo passes to or from an employer engaged in [maritime commerce] to an employer engaged in [land commerce].", *ibid.* 639. If finely drawn distinctions result from the application of Judge Gibbon's analysis, the test *amicus* proposes will resolve them.